HJ SALLEH HJ JANAN

v.

**FINANCIAL INFORMATION SERVICES SDN BHD;
AFFIN-ACF FINANCE BHD (THIRD PARTY)**

HIGH COURT SABAH & SARAWAK, SANDAKAN
LINTON ALBERT JC
[SUIT NO: S22-05-2001]
18 NOVEMBER 2004

TORT: *Defamation - Libel - Justification - Defendant publishing information that plaintiff had been adjudged a bankrupt twice - Fact that adjudication orders were rescinded and annulled were not included in published information - Whether published information defamatory - Whether defendant's plea of justification succeeds - Whether defendant could re-publish court records on adjudication orders made against plaintiff - Whether a 'public fact' that anyone can re-state*

The instant action for libel was brought by the plaintiff (a businessman and politician) against one Financial Information Services Sdn Bhd ('the defendant') – a limited company incorporated by the Association of Finance Companies of Malaysia ('AFCM') and the Association of Hire Purchase Companies of Malaysia ('AHPCM'). The primary business objective of the defendant is to gather pertinent financial and commercial information and, thereafter, to provide them to the members of ACFM and AHPCM for a fee. As it transpired, the defendant had supplied some information regarding the plaintiff to one Affin-Acf Finance Bhd, the third party in the instant action. The information was to the effect that the plaintiff had been adjudged a bankrupt twice, once under Petition No: S-17-1991 (adjudication order – 10 December 1991) and once under Petition No: S-33-1980 (adjudication order – 10 February 1981). The plaintiff did not dispute the fact that the adjudication orders were made, but submitted that the adjudication order under Petition No: S-17-1991 had been rescinded and annulled on 15 October 1997 as had the adjudication order under Petition No: S-33-1980 on 18 September 1995. On its part, the defendant did not dispute that the details respecting the rescission and annulment of the adjudication orders were not included in the information it had supplied to the third party. As a result of this, the plaintiff contended, as per its amended statement of claim, that the words contained in the information supplied by the defendant could only mean or be understood to mean, in their

natural and ordinary sense, that the plaintiff was an un-discharged bankrupt and a failed businessman and was, therefore, un-creditworthy. It was contended that the publication of the said words/information by the defendant had seriously injured the plaintiff in terms of his character, reputation and creditworthiness. In defence, the defendant denied that the words published were capable of the meaning ascribed to them by the plaintiff; it also pleaded justification or, alternatively, qualified privilege.

Held (dismissing the plaintiff's action)

[1] (i) Save in so far where it has been modified by the Defamation Act 1957, the common law of England on defamation applies in Malaysia. (ii) A plaintiff must first discharge the burden of establishing that the words complained of are defamatory; only then does the defendant have to show that the words are in substance and in fact true. (iii) Truth or justification is an absolute defence to action for libel or slander. (iv) "A decision as to the libellous or innocent character of particular words in particular circumstances cannot govern the construction of different words, however minute the difference may be." (p 244 d-g)

[2] The defendant's failure to include the details respecting the rescission and annulment of the adjudication orders in the information it supplied to the third party could well have rendered the words contained in the information defamatory. Further, the exclusion or indemnity clauses in the agreement between the defendant and the third party (or any other AFCM or AHPCM member to which such information was supplied) did not ameliorate the defamatory meaning of the said words. (pp 244 g-h & 245 a-d)

[3] **Nevertheless,** the defendant was **not** liable to the plaintiff for defamation. This was because all the defendant ever did was to **restate** information as contained in orders of court which had already been published in the Daily Express newspaper as well as in the Gazette. "It is a public fact which everybody is entitled to state." Freedom of expression bears the basic tenet that the truth must prevail; it could not be concealed from the public so that the plaintiff might enjoy the unblemished reputation that he never deserved. The plaintiff would have to live with the stigma of having been adjudged a bankrupt twice, and might even have to endure the lingering damage to his reputation caused by the adjudication orders long after he has been discharged because such orders are a part of the court records and could, therefore, be published by the defendant. Consequently, the defendant's plea of justification would succeed here. (p 245 d-h)

Case(s) referred to:
Abdul Rahman Talib v. Seenivasagam & Anor [1966] 2 MLJ 66 ***(refd)***
Soh Chun Eng v. Ctos-EMR Sdn Bhd [2004] 5 CLJ 46 HC ***(refd)***
Stubbs Ltd v. Russell [1913] AC 886 ***(foll)***

Other source(s) referred to:
Keith Econs, *The Law of Defamation in Singapore and Malaysia*, 2nd edn, p 49

For the plaintiff - Edwin Tsen (Wong Shang Len & Catherine Voo); M/s Tan Pang Tsen & Co
For the defendant - David Wong (Ain Karama); M/s Peter Lo & Co
For the 3rd party - Majnah Abdillah (Siti Rafidah Miasin); M/s MF Poon Hiew & Assoc

Reported by Gan Peng Chiang

JUDGMENT

Linton Albert JC:
The plaintiff is a businessman and a politician. He was at one time a State Assemblyman and is presently a Supreme Council member of a political party and has many contacts through which he was able to get contracts or projects. The defendant is a limited company incorporated by the Association of Finance Companies of Malaysia and the Association of Hire-Purchase Companies of Malaysia mainly for the purpose of collecting and circulating commercial and financial information to members of the associations on matters relating to their businesses. The defendant would upon request, and for a fee, supply information from its database to any member of the associations. This action arose out of the supply of information about the plaintiff by the defendant to the third party and other financial institutions. The information was supplied by the defendant through what is known as Enquiry Details. It is not disputed that the Enquiry Details was sent to 2 financial institutions on 13 March 2000. The Enquiry Details contained information about the plaintiff to the effect that the plaintiff had been adjudged a bankrupt twice, by virtue of Petition No. S.17-1991 and S. 33-80 in respect of each of which an Adjudication Order was made on 10 December 1991 and 10 February 1981 respectively. The plaintiff admits to the truth of the information supplied by the defendant in the Enquiry Details but states that the adjudication order under Petition No. S.17 – 91 had been rescinded and annulled on 15 October 1997, as had the adjudication order under Petition No. s. 33 – 80 on 18 September 1995 in respect of which the defendant, in turn, admits to have omitted from the Enquiry Details, and by their omission, the plaintiff contends in paras 4 and 5 of the amended statement of claim as follows:

4. In their natural and ordinary meaning the said words meant and were understood to mean that the Plaintiff was an undischarged bankrupt and that he was not creditworthy and a business failure.

5. By reason of the publication of the said words the Plaintiff has been seriously injured in his character, credit and reputation and has been brought into public scandal, odium, contempt and has suffered loss and damages.

Hence, the plaintiff claims several reliefs including compensatory and exemplary damages and an injunction restraining the defendant from further publishing or causing to be printed published or distributed words contained in the Enquiry Details or any similar words defamatory of the plaintiff.

The defendant denies that the words are capable of the meaning ascribed to them by the plaintiff. The defendant also pleaded justification or alternatively, qualified privilege.

The law on defamation is well settled, laid down in numerous decided cases of high authority. I do not, therefore, propose to add to this wealth of authorities except to reiterate some of the principles of law relevant for the determination of the present case. Firstly, the common law of England applies except in so far as it has been modified by the Defamation Act 1957 (see *Abdul Rahman Talib v. Seenivasagam & Anor* [1966] 2 MLJ 66 at p. 72); Secondly, the plaintiff must first discharge the onus of proving that the words complained of were defamatory of the plaintiff and only then does the burden rest on the defendant to prove those words are in substance and in fact true (see *Soh Chun Eng v. Ctos-EMR Sdn Bhd* [2004] 5 CLJ 46); thirdly, as a matter of law, truth or justification, is an absolute defence in libel or slander (see *The Law of Defamation in Singapore and Malaysia* by Keith Econs (2nd edn), at p. 49); and fourthly, a decision as to the libellous or innocent character of particular words in particular circumstances cannot govern the construction of different words, however minute the difference may be. (see *Stubbs Limited v. Russell* at p 895, *infra*).

It is perfectly conceivable that by the omission of the defendant to state in the Enquiry Details that the plaintiff was no longer an undischarged bankrupt or that both the adjudication orders under the two bankruptcy petitions had been rescinded and annulled, the words in the Enquiry Details by themselves could and did bear one or more of the defamatory meanings contended by the plaintiff. I am not at all persuaded that all these defamatory meanings can be sufficiently repelled by the words contained in the agreement between the

defendant and those members of the associations to whom information is supplied by the defendant. Reliance by the defendant on cl. 5.0 of the agreement between the defendant and the third party is misplaced. Clause 5.0 reads as follows:

> Indemnity
>
> Whilst FIS shall use its best endeavours and efforts to ensure the accuracy of information supplied to the Member, FIS does not hold out or represent that the information supplied by FIS shall be accurate or complete.

In any event, the Enquiry Details itself does not contain the aforesaid clause or words to that effect which would have moderated the meaning the information in the Enquiry Details ought to bear and more importantly, I do not think it is open to the defendant to simply brandish a document mothballed somewhere in its office and claim that the express language of one or more of the clauses in that document absolutely excluded all the imputations ascribed to the words in the Enquiry Details. Be that as it may, the defendant is nevertheless not liable to the plaintiff for defamation because what the defendant did was to re-state (in the Enquiry Details) Court Orders which had been published in the Daily Express Newspaper and the Gazette. The principle in support of this finding is explained in more forceful language by Lord Kinnear in *Stubbs Limited v. Russell* [1913] AC 886 at p. 891.

> All that is to the purpose to say upon this statement in defence at present is that the appellants cannot plead, as they might otherwise have done, that no action will lie for a mere statement made in a newspaper or elsewhere that a decree has passed in a public Court of justice, because that is a public fact which everybody is entitled to state.

Freedom of expression bears the bear tenet that the truth must prevail it cannot be relegated to being concealed from everybody so that the likes of the plaintiff here can enjoy an unblemished reputation they do not deserve. The plaintiff has to bear the stigma attached to having been adjudged a bankrupt twice and may even have to endure the lingering damage to his reputation caused by the adjudication orders passed by the court, long after he has been discharged because they are part of the court records and can be published, as it was, in the Enquiry Details. In these circumstances, I hold that the defendant has succeeded in its plea of justification and accordingly find it unnecessary to consider and determine the defendant's alternative plea of qualified privilege. I also find that the plaintiff's alternative claim in negligence must also fail because the defendant does not owe a duty to conceal

the truth about the plaintiff having been adjudged a bankrupt twice. No evidence has been led by the defendant in relation to the alleged liability of the third party to the defendant and is clearly not seriously pursued by the defendant.

The plaintiff's claim against the defendant is, for the reasons aforesaid, dismissed with costs and, in the circumstances, I also order that the defendant's claim against the third party be similarly dismissed with costs.